

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY FLOYD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

September 14, 2006

No. 260904

Macomb Circuit Court

LC No. 03-003381-FH

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of uttering and publishing, MCL 750.249, and sentenced to nine months in jail, with credit for 124 days served. He appeals as of right, and we now affirm.

Defendant first contends that the prosecutor engaged in misconduct by cross-examining him concerning the veracity of prosecution witness Teresa Sorby, by questioning Sorby and defendant in a manner that bolstered Sorby's credibility, and by personally vouching for Sorby's credibility during closing argument. Because defendant failed to object at trial to any alleged instance of misconduct, we review these unpreserved claims only for plain error that affected defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), overruled in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *Id.* at 721.

This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*Id.* (internal citations omitted).]

The prosecutor's conduct is considered in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant insists that the highlighted portions of the following exchange reflect improper questioning by the prosecutor concerning Sorby's veracity and improper efforts to bolster Sorby's credibility:

Defendant: I didn't try to cash nothing. It wasn't in my attentions [sic].

* * *

Prosecutor: You know, let's talk about that. You here [sic] Ms. Sorby say today, that you approached her booth—her window—

Defendant: No doubt about it.

Prosecutor: And that you stated, I'd like to cash this check, or I want to cash it. You indicated to her you wanted to cash the check. *Are you saying that Ms. Sorby is lying?*

Defendant: Are you saying that I'm lying? Are you saying I got no sense to endorse a check before I ask—

Prosecutor: Yes, I am.

Defendant: Okay. *Then, I'm saying she's lying.*

Prosecutor: *Why would Ms. Sorby lie?*

Defendant: Good question. Good question. That is a—

Prosecutor: She doesn't know you, right?

Defendant: I assume not.

Prosecutor: She's never met you before?

Defendant: I assume . . . she hasn't.

Prosecutor: She's worked at a bank for 15 years, 17 years.

Defendant: I assume she have [sic].

Prosecutor: *Interesting that she would pick you out—*

Defendant: It's very interesting that I would come up there and try to cash a check that's not even endorsed.

Prosecutor: You also indicated that—with regard to bank teller number two, Ms. Sorby—

Defendant: Okay.

Prosecutor: —who testified earlier—who testified yesterday, that you indicated to her that you were not in fact, there to cash this check; is that correct?

Defendant: Yes. Yes, ma'am.

Prosecutor: *So she lied again?*

Defendant: I guess so. She has—*she has lied, period.* Now, wait, let me say this here. You can't say nobody lies for whatever the reasons are being dishonest. I don't know why. . . .

Prosecutor: *You've got some pretty good reasons for being dishonest today?*

Defendant: I beg your pardon.

Prosecutor: *You've got some pretty good reasons for being dishonest today, don't you?*

Defendant: No, I don't. For what reason? [Emphasis added.]

Michigan courts recognize “that it [i]s improper for the prosecutor to ask [a] defendant to comment on the credibility of prosecution witnesses.” *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). A defendant's opinion concerning the credibility of another witness does not qualify as probative evidence, and determinations regarding witness veracity fall within the province of the fact finder. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). In the above-quoted exchange, the prosecutor twice improperly inquired of defendant whether Sorby had lied during her testimony that he tried to cash the check. After defendant expressly declared that Sorby had lied, the prosecutor also asked the follow up question, “Why would Ms. Sorby lie?”

Assuming that the prosecutor posed to defendant three improper queries relating to Sorby's credibility, we find that these plain improprieties did not affect defendant's substantial rights. *Schutte, supra* at 720-721. During defendant's frequently rambling testimony on direct examination, he asserted repeatedly that he did not request that Sorby cash the check, and that he only sought to ascertain whether the check “was good.” Also on direct examination, defendant insisted that he was an honest man and criticized the case against him, as being “dishonest and disrespectful.” Thus, viewed in context, the prosecutor's subsequent inquiries regarding whether and why Sorby might have lied appear intended to rebut defendant's description of himself as honest and his criticism of the prosecution's case against him. *Schutte, supra* at 721.

Defendant correctly observes that this case boiled down to a credibility contest concerning his intent when he turned over the check to Sorby. Before the prosecutor's cross-examination of defendant, however, the disparity between Sorby's testimony that defendant sought to cash the check and defendant's direct examination recollection that he merely inquired about the check's validity was already before the jury. The prosecutor's elicitation of

defendant's view that Sorby lied did not significantly alter the jury's ultimate responsibility to determine which competing view of defendant's intent should prevail. Additionally, the trial court instructed the jury in accordance with CJI2d 3.1 that the jury "must decide what the facts in this case are," "includ[ing] whether you believe what each of the witnesses said[;] what you decide about any fact in the case is final," and CJI2d 3.6 regarding the jury's duty to determine witness credibility. We therefore conclude that the prosecutor's improper cross-examination questions of defendant whether Sorby had lied did not affect the outcome of his trial. *Schutte*, *supra* at 720, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also *Knapp*, *supra* at 385 (any undue prejudice arising from the prosecutor's improper questions of the defendant regarding witness credibility could have been cured by a timely objection and curative instruction).

With respect to the prosecutor's cross-examination questions of defendant whether Sorby, who had worked at the bank for about 15 years, knew or ever had met defendant, these inquiries properly probed the relevant subject whether Sorby had any bias or motive tending to influence her testimony that defendant sought to cash the official check. *People v Layher*, 464 Mich 756, 762-764; 631 NW2d 281 (2001) (explaining that evidence of a witness's bias nearly always qualifies as relevant); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (observing that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence").

Concerning the prosecutor's inquiry whether defendant had "some pretty good reasons for being dishonest today," we conclude that the prosecutor properly questioned defendant about his credibility in response to his own declaration of honesty during direct examination. MRE 611(b) (providing that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility"); *Layher*, *supra* at 762-764; *Schutte*, *supra* at 721. Even assuming some impropriety in the prosecutor's question, defendant suffered no resultant prejudice because defense counsel placed an unspecified objection on the record before defendant answered the question, and the prosecutor then withdrew the question.

In his brief, defendant also complains that the prosecutor improperly elicited from Sorby "self-serving testimony . . . suggesting she was not the kind of person who would testify falsely," as well as "testimony to suggest [Sorby] was in a superior position to evaluate [defendant's] honesty." Defense counsel recalled Sorby briefly as a defense witness, and the prosecutor thereafter cross-examined Sorby regarding whether she had met defendant before October 6, 2003, and as follows about Sorby's work experience at Fifth Third Bank:

Prosecutor: I want to just go a little bit—what is your status as an employee at the bank?

* * *

Are you in good standing?

Sorby: Oh, yes, excellent.

Prosecutor: Have you ever been reprimanded for anything?

Sorby: No.

Prosecutor: No allegations of dishonesty?

Sorby: No.

Prosecutor: Have you ever been promoted?

Sorby: I chose not to be promoted. I was offered a manager position, but I turned it down.

Prosecutor: Okay. Have you ever, in the course of your employment at the bank, ever received any training, say, regarding fraudulent activities?

Sorby: Yes, we're all required to go through fraud training twice a year.

Prosecutor: Okay. Can you describe the nature of that training?

Sorby: Well, yes. What we do is we go over Fifth Third documents, the proper way they're supposed to be prepared. We also go over the demeanor of someone coming into the bank, trying to commit fraud. And, usually, that person—they're very cool, you know, calm and collected. They're not nervous. They're very congenial. It's that type.

Prosecutor: And can you recall the demeanor of the defendant on October 6, 2003?

Sorby: Yes. He was very pleasant. He was relaxed. He was congenial.

Prosecutor: Did that also draw your attention to the—

Sorby: Yes.

Prosecutor: —fraudulent nature of his check?

Sorby: Yes.

Contrary to defendant's characterization of the first three quoted questions as impermissible, we conclude that the prosecutor properly questioned Sorby to expose further detail concerning her credibility or potential for bias, a highly relevant issue in this case. *Layher, supra* at 762-764. With respect to the next four questions posed by the prosecutor concerning Sorby's fraud detection training at the bank, they represent proper inquiries designed to elicit relevant testimony regarding her ability to detect whether defendant produced a fraudulent check in this case intending to cash it, elements of the charged crime disputed by defendant. MRE 401; MRE 402; *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003), overruled in part on other grounds in *People v Melton*, ___ Mich App ___, ___ NW2d ___ (Docket No. 257036, issued July 20, 2006); *Noble, supra* at 660. These four fraud detection inquiries simply contain no improper hint or suggestion that the prosecutor had some personal or other special knowledge

that Sorby had testified truthfully, as defendant maintains. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Regarding the prosecutor's closing argument, defendant complains that the following excerpts reflect her improper vouching for Sorby's credibility:

Let's talk about the witnesses. The first witness I want to talk about is Ms. Sorby. Teresa Sorby was a bank teller. Bank teller number two, for reference. *She [sic] the perfect witness. She has absolutely no motive. She's absolutely not prejudice [sic] toward this defendant in any way. She has no bias in this case. She has no interest in the outcome.* She's not getting any money as a result of this case. She doesn't get a share of the check for \$600. Nothing. All she's doing is missing a day of work, and having to come to work—or come here in this uncomfortable situation, and state what happened on those two different days. That's all.

And listen to what she said. *She never wavered in anything that she said. Not once. The date. The time. Who came in? What the situation was? She didn't lie.* She told you how he came in on October 6 and handed her this check. . . . She didn't say . . . she said he never said anything about is this check good. Never at any time. Her testimony over and over again was that he indicated to her he wanted money for this check. . . . She was the one who originally . . . made the check, and made the copies of the check. Why wouldn't she remember the situation? You know, that has nothing to do with coming back with, you know, coming back to trial, sitting at the trial, . . . today. It has to do with *this bank teller, who obviously is very diligent in her job. She's never had any reprimands. She was offered a promotion.* . . .

* * *

. . . Ms. Sorby told you that at no time did this defendant ever say I just want to know if the check is good. Not when she asked for his ID[.] Not when he initially came to the window. At no time. Not when she said . . . how much money do you want for this. At no time did he back away from the window, did he say I don't want any money, that's not my intention here. *She never wavered in that. She remembered this interaction. She is the 100 percent credible witness.* [Emphasis added.]

We conclude that all of the emphasized comments challenged by defendant, and the entire quoted portion of the prosecutor's closing argument, reflect proper argument of the trial evidence, specifically Sorby's testimony, and the reasonable inferences arising therefrom that Sorby's consistent testimony of the events was worthy of belief. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004) (explaining that "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes"); *Schutte*, *supra* at 721. Once again, the prosecutor's remarks contain no improper suggestion that she had personal or special knowledge concerning Sorby's veracity. *Bahoda*, *supra* at 276.

In summary, although the prosecutor committed one instance of misconduct when she repeatedly asked defendant whether Sorby had lied,¹ this instance did not alter the outcome of defendant's trial. *Carines, supra* at 763.²

Defendant lastly asserts that insufficient evidence supported his conviction. Defendant essentially argues that the jury should have accepted his testimony concerning his actions and intent, and that his account of the transaction gives rise to no inference of unlawful intent. But defendant ignores that Sorby's testimony supports a reasonable inference that he knowingly presented an altered check for payment, intending to cash it. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005) (observing that because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required). The jury credited Sorby's version of events, and this Court will not second guess the fact finder's credibility determinations. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto

¹ Because the other instances of prosecutorial misconduct alleged by defendant do not constitute misconduct, defense counsel need not have objected to them. *Thomas, supra* at 457.

² Because the lone instance of prosecutorial misconduct did not affect the outcome of defendant's trial, defendant cannot establish that his counsel provided him ineffective assistance, i.e., the existence of "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).